No. 92-259

In The

Supreme Court of the United States

October Term, 1992

OKLAHOMA TAX COMMISSION, *Petitioner,*

v.

SAC AND FOX NATION, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 10, 1992
CERTIORARI GRANTED NOVEMBER 9, 1992

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE SAC AND FOX NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIV-90-1553 A
	)	
THE OKLAHOMA TAX COMMISSION,	)	
	)	
Defendant.	)	

COMPLAINT

Plaintiff for its claim for injunctive relief against Defendant alleges and states:

PARTIES

1. Plaintiff Sac and Fox Nation, hereinafter referred to as the "Sac and Fox" is a federally recognized Indian tribe, having a government to government relationship with the United States established and governed by treaty. The capital of the Sac and Fox Nation is located near Stroud, within the boundaries of Lincoln County, State of Oklahoma, and the Sac and Fox Nation is organized pursuant to the Oklahoma Indian Welfare Act, 25 U.S.C. 501 et seq., and the Indian Reorganization Act, 25 U.S.C. 461 et seq. The Sac and Fox Nation brings this action on behalf of itself and all residents of its territorial jurisdiction.

2. Defendant Oklahoma Tax Commission is an agency of the State of Oklahoma charged with the administration and enforcement of the state tax laws generally, and the state tax laws relative to motor vehicles and income taxes in particular.

JURISDICTION AND VENUE

3. Jurisdiction is conferred upon this court pursuant to 28 U.S.C. 1331, 28 U.S.C. 1345, and 28 U.S.C. 1362 in that this action arises under the Constitution and laws of the United States; the Oklahoma Indian Welfare Act of 1936, 25 U.S.C.A. 501 et seq.; the Indian Reorganization Act of 1934, 25 U.S.C. 461 et seq.; the Federal Common Law; and the treaties between the United States and the Sac and Fox as hereinafter more fully appears. Plaintiff submits to this Court's jurisdiction for the limited and sole purpose of securing the injunctive relief prayed for herein.

4. Venue lies in this district pursuant to 28 U.S.C. 1391(b) as the acts of Defendant complained of occurred within this district and Defendant resides within this district and within the State of Oklahoma within the meaning of the venue statutes.

ALLEGATIONS

5. Since time immemorial, the Sac and Fox Nation has been a people having the power to make their own laws and enforce them exclusive as to any state and this right has been repeatedly recognized and confirmed by the federal government.

6. The Sac and Fox Nation has created and maintained an agency of the Sac and Fox known as the "The Sac and Fox Tax Commission" which is charged with the administration of the tax laws of the Sac and Fox, including the tribal tax laws relating to and levying taxes upon motor vehicles and income or earnings.

7. The federal common law and the numerous treaties and agreements between the Sac and Fox and the United States guarantee to and recognize in the Sac and Fox the exclusive powers of self-government over both their members and other persons and property within their territory.

8. The Constitution, laws, and treaties between the Sac and Fox and the United States of America are the supreme laws of the land and exclusively controls the relationship between the United States and the Sac and Fox.

9. The actions of the Defendant herein complained of are unlawful, unconstitutional, and illegal in that federal law pre-empts all purported authority of the State of Oklahoma, its agencies, officers, or employees, to act in the manner as described in this complaint.

10. The actions of the Defendant herein complained of are unlawful, unconstitutional, and illegal in that such actions interfere with the federally protected right of the Sac and Fox Nation to govern itself, and all persons and property within its territory.

11. That the territorial jurisdiction of the Sac and Fox Nation includes all Indian Country of the Sac and Fox Nation as defined in 18 U.S.C. 1151, including without limitation the Sac and Fox Indian Reservation and all parts thereof not extinguished by treaty or act of Congress, and all lands added thereto, all Sac and Fox Indian trust allotments, and all lands owned by the Sac and Fox Nation or its agencies whether in trust or in fee restricted by U.S.C. 177.

12. Upon information and belief, Defendant while acting under color of the laws of the State of Oklahoma, and the state tax laws in particular, has subjected Plaintiff, and the residents of Plaintiff's jurisdiction, as citizens of the United States and persons within the jurisdiction thereof, to the deprivation of the Sac and Fox Nation's treaty protected rights and privileges of self-government, and the immunity from the exercise of state jurisdiction over all property and persons within the territorial jurisdiction of the Sac and Fox secured by the federal Constitution, the treaties between the United States and the Sac and Fox, and other federal law.

13. Upon information and belief, Defendant and other persons unknown to Plaintiff, under color of state law, have acted in concert and conspired together to deprive Plaintiff, and those persons residing within Plaintiff's territorial jurisdiction, of the equal protection of the laws in that such persons are singled out for harassment, coercion, and intimidation for exercising the privileges and immunities guaranteed to them by federal law, and have been prevented by such action from exercising such rights.

14. That in each case herein complained of, Defendant has unlawfully and without due process of law taken or attempted to take money or other property from Plaintiff and residents of Plaintiff's territorial jurisdiction, under color of the state tax laws.

15. That in each case herein complained of, Defendant has unlawfully and in violation of the Indian Commerce Clause of the United States Constitution, and federal laws enacted pursuant thereto, illegally interfered with commerce with the Plaintiff and its residents.

16. Plaintiff has and will suffer immediate and irreparable injury and a multiplicity of lawsuits if the injunctive relief sought herein is not granted and Plaintiff has no adequate remedy at law.

17. Defendant has no rational nexus for the levy or collection of any of the taxes herein as described in this complaint.

FIRST CLAIM FOR RELIEF

18. Paragraphs 1 - 17 are incorporated herein.

19. Among the duties of the Sac and Fox Tax Commission is the duty to administer the laws of the Sac and Fox Nation relating to issuing titles for, registration and taxation of, and placing license tags upon motor vehicles, mobile or manufactured homes, trucks, motor cycles, and similar powered conveyances, owned by residents of, and primarily garaged within the territorial jurisdiction of the Sac and Fox.

20. The Sac and Fox Tax Commission, acting for the Sac and Fox Nation, has issued titles and registrations for, placed license plates on, and collected tribal taxes upon certain motor vehicles, mobile or manufactured homes, and similar powered conveyances.

21. The Sac and Fox, and residents of the Sac and Fox jurisdiction, own motor vehicles upon which tribal taxes due have been paid and which bear license plates and have titles issued by the Sac and Fox. These titles and license plates have been ruled valid by the Oklahoma State Courts which found no state taxes to be due.

22. That without authority of law, and in violation of the rights and immunities recognized in or granted to Plaintiff by the federal common law relating to Indian tribes in general, and the treaties with the Sac and Fox in particular, the Defendant has and is attempting to apply the laws of the State of Oklahoma to tax, license, register, and title the motor vehicles and other conveyances more particularly described above.

23. That in unlawfully attempting to enforce the laws described above, and in unlawfully attempting to prevent the legal taxation by the Sac and Fox upon Sac and Fox residents, the Defendant, or its agents or servants, has coerced and harassed residents of the Sac and Fox Nation when said residents have made or attempted to make commercial transactions with residents of the State of Oklahoma, and Defendant has harassed residents of the State of Oklahoma in an attempt to prevent commercial transactions from taking place with Sac and Fox residents which have paid motor vehicle taxes to the Sac and Fox Tax Commission.

24. That in unlawfully attempting to enforce the laws described above, and to otherwise prevent the lawful taxation by the Sac and Fox Nation of its residents, the Defendant, or its agents or servants, has refused to issue Oklahoma titles and license plates for vehicles titled and tagged by the Sac and Fox upon the sale of such vehicles to persons not residing within the jurisdiction of the Sac and Fox Nation, or when the owner thereof moves to a location outside the territorial jurisdiction of the Sac and Fox, until and unless the owner, purchaser, or prior owner pay to them monies for the time said vehicles were titled and tagged by the Sac and Fox Nation even though no taxes or fees for such period are due; and that Defendant does not collect taxes and harass similarly situated citizens from jurisdictions such as Texas, Kansas, and other states located within the United States.

25. That these discriminatory actions taken and threatened by the Defendant as herein described will cause residents of the Sac and Fox jurisdiction to evade or avoid payment of tribal taxes and compliance with tribal law; and that residents of the Sac and Fox jurisdiction will be forced to travel outside of Oklahoma to

engage in commerce.

26. That the course of action taken by Defendant, including the collection of monies for payment of purported state taxes upon such vehicles have injured the Plaintiff by unlawfully depriving Plaintiff and its residents from exercising their rights and privileges to travel, engage freely in commerce in the United States, and deprivation of property and liberty without due process of law.

27. The conspiracy and action taken by Defendant, and upon information and belief, as formal or informally decided State, department, or commission policy have resulted in damage to Plaintiff and unlawfully interfered with Plaintiff's right to govern, and are outside the scope of Defendant's authority for the reasons stated herein.

28. Unless Defendant is enjoined from interfering with Plaintiff's right to tax and the Plaintiff's citizens' rights to engage in commerce with citizens of the United States, Plaintiff will sustain substantial and irreparable injury to its right to self-government.

SECOND CLAIM FOR RELIEF

For its second claim for relief the Plaintiff alleges and states as follows:

29. Paragraphs 1 - 17 are incorporated herein.

30. The Sac and Fox Nation has and continues to pay its officers and employees for their services and other duties performed for the Nation primarily within the Sac and Fox jurisdiction.

31. Other employers pay residents of the Sac and Fox territorial jurisdiction for their services and other duties performed for their employees primarily within the Sac and Fox jurisdiction.

32. The Sac and Fox Nation has levied a tax upon earnings of employees as defined by the laws of the Sac and Fox Nation, and such tax is administered and collected by the Sac and Fox Commission.

33. Defendant is and continues to unlawfully attempt to require employees to pay money for state income taxes which

they claim to be due on compensation paid by the Nation and other employers for such services within the Sac and Fox jurisdiction, without either civil or criminal jurisdiction to do so, and in violation of Plaintiff's rights to due process of law.

34. Defendant is and continues to unlawfully attempt to require officers and employees of Plaintiff and other employers to pay them money for state income taxes which they claim to be due on such compensation paid to employees without either civil or criminal jurisdiction to do so in violation of Plaintiff's and such person's rights to self-government and due process of law.

35. That the action taken and threatened by Defendant as herein described has caused some residents and persons earning or paying compensation within the Sac and Fox jurisdiction to evade or avoid payment of tribal taxes and compliance with tribal law.

36. The conspiracy and action taken by Defendant upon information and belief as formally or informally decided state, department, or commission policy has resulted in injury to Plaintiff.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment:

A. Declaring that the Oklahoma Tax Commission has no authority to:

(1) enforce its motor vehicle laws relating to titles, registration, and taxation of motor vehicles owned by residents of, and principally garaged within, the Sac and Fox jurisdiction, or to refuse to recognize the Sac and Fox titles, registrations, tags, and other motor vehicle laws as valid, or to require payment of Oklahoma taxes and fees for the period such motor vehicles were located within the Sac and Fox jurisdiction, or to refuse to issue titles, tags and other Oklahoma documents to purchasers of such vehicles or to those who move outside the Sac and Fox jurisdiction.

(2) levy or collect any tax upon the income of persons residing within the jurisdiction of the Sac and Fox or persons earning income within the jurisdiction of the Sac and Fox.

B. Upon a final hearing and determination that the Court issue a permanent injunction enjoining Defendant, and its agents, servants, employees, attorneys and all persons in active concert and participation with them from:

(1) Applying, attempting to apply, or enforcing, or attempting to enforce its motor vehicle laws relating to titles, registration, or taxation of motor vehicles owned by residents of, and principally garaged within, the Sac and Fox jurisdiction, or from attempting to collect taxes on such vehicles for the time period with which they were registered within the jurisdiction of the Sac and Fox Nation, or to refuse to issue titles, tags and other Oklahoma documents to purchasers of such vehicles outside the Sac and Fox jurisdiction until a tax is paid to Oklahoma for period such motor vehicles were located within the Sac and Fox jurisdiction.

(2) Enjoining the State of Oklahoma and the Oklahoma Tax Commission from taxing the income of persons who have earned their income within the jurisdiction of the Sac and Fox Nation, or the income of persons who reside within the jurisdiction of the Sac and Fox Nation.

Respectfully submitted,

_____

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G. WILLIAM RICE, P.C.
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE SAC AND FOX NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIV-90-1553 A
	)	
THE OKLAHOMA TAX COMMISSION,	)	
	)	
Defendant.	)	

ANSWER

COMES NOW the Defendant and for its answer alleges and states:

1. Defendant admits that the Sac and Fox Nation ("Tribe" hereafter) is a federally recognized Indian tribe. Defendant admits that the tribal capital is located near Stroud, within the State of Oklahoma, County of Lincoln, and the tribe is organized pursuant to federal law, 25 U.S.C. 501 et seq. and/or 25 U.S.C. 461 et seq.

2. Defendant admits that it has been properly designated in the complaint as the state agency charged with administration of tax laws.

3. Defendant admits that this Court properly has jurisdiction in this case pursuant to 28 U.S.C. 1362.

4. Defendant admits that venue is properly before this Court.

5. Defendant admits that this Tribe has a right to make its own laws and be ruled by them but denies that the Tribe may enforce its laws to the exclusion of State laws and denies that tribal laws may be enforced against non-members.

6. Defendant has no knowledge of Commissions within the tribal government of the Sac and Fox Nation and has no knowledge of tribal tax laws enacted by the Tribe and can neither

admit nor deny allegation 6 in the Complaint.

7. Defendant denies that the Tribe maintains exclusive powers of self-government over both tribal members and non-members anywhere within the State of Oklahoma.

8. Defendant admits that the Constitution, laws and treaties of the United States of America are the supreme laws of the land pursuant to the Constitution of the United States, Article VI clause (2). Defendant denies any allegation that the Tribe or its members are not responsible to comply with State laws within Oklahoma where no Indian reservations exist.

9. Defendant denies that it has taken any actions which are illegal or unconstitutional and denies that federal law has pre-empted State laws of taxation.

10. Defendant denies that it has taken any actions which are illegal or unconstitutional and denies that it has taken any actions which would interfere with the Tribe's rights to govern itself.

11. Defendant denies the existence of a Sac and Fox Indian Reservation and alleges that no Indian reservation as that term is defined in 18 U.S.C. 1151(a), exists in Oklahoma. Defendant denies the existence of any "territorial jurisdiction of the Sac and Fox Nation" within the State of Oklahoma. Defendant alleges that the Tribe maintains jurisdiction over the tribal members only as to tribal matters.

12. Defendant denies that it has deprived the Tribe's rights to self-government by enforcement of State tax laws and denies that the federal laws and Constitution provide any immunity to State citizens from State tax laws and therefore denies that anyone's rights to such an immunity has ever been denied by the Tax Commission's law enforcement.

13. Defendant denies that it has conspired to deprive Plaintiff or any of its members or other people from equal protection of the laws and denies that it has harassed, coerced or intimidated anyone.

14. Defendant denies that it has unlawfully and without due process of law taken or attempted to take money or property from Plaintiff or other persons.

15. Defendant denies that it has taken any action against the

Plaintiff or others in violation of the Indian Commerce Clause of the United States Constitution or illegally interfered with the Plaintiff's commerce with other people.

16. Defendant denies that Plaintiff has suffered any injury capable of redress in this Court.

17. Defendant denies that it has no rational nexus to tax citizens within the State of Oklahoma.

FIRST CLAIM

18. See paragraphs 1 - 17.

19. Defendant has no knowledge of the duties of the Sac and Fox Commission and therefore neither admits nor denies this allegation.

20. Defendant has no knowledge of taxes collected by the Sac and Fox Tax Commission and neither admits nor denies this allegation.

21. Defendant has no specific knowledge of motor vehicles owned by the Tribe or other people nor does the Defendant know whether tribal taxes have been paid and neither admits nor denies this allegation. Defendant denies that these "titles and license plates" have been ruled "valid" by the Oklahoma State Courts which found "no state taxes to be due".

22. Defendant admits that it does enforce its motor vehicle tax laws against the citizens of this State and concerning motor vehicles and transactions in this State but denies that this enforcement is without authority of law or in violation of any law.

23. Defendant denies that its tax enforcement is unlawful and denies that it has prevented the Tribe from collecting its own taxes or has coerced or harassed anyone.

24. Defendant admits that it refuses to issue titles or licenses to motor vehicles until all delinquent taxes which are due and owing are paid, regardless of whether tribal taxes have been previously paid. Defendant admits that it issues transfer titles to motor vehicles previously titled and tagged in other states upon the payment of current registration fees, however, those out-of-state vehicles are not similarly situated to vehicles which are only

tribally tagged or titled.

25. Defendant denies that its actions are discriminatory or an interference to the Tribe's own tax enforcement because the State's tax laws apply to all citizens of the State and the enforcement of tribal laws are the sole responsibility of the Tribe.

26. Defendant denies that its actions have deprived the Tribe's rights to travel or engage in commerce and Defendant denies that its actions have deprived the Tribe of property and liberty without due process.

27. Defendant denies that its actions have resulted in any damage to the Tribe and denies that it has interfered with Plaintiff's right to govern.

28. Defendant denies that the Tribe will sustain any injury or damage due to State taxation of the citizens of this State.

SECOND CLAIM

29. See paragraphs 1 - 17.

30. Defendant admits the Tribe pays its employees for their services but denies the existence of a "Sac and Fox jurisdiction".

31. Defendant admits that other employers in Oklahoma pay their employees for services performed but denies the existence of a "Sac and Fox jurisdiction".

32. Defendant has no knowledge of tribal tax laws or administration and neither admits or denies allegation 32.

33. Defendant admits that it does attempt to collect income tax from citizens of this State but denies that the State income tax laws are unlawful or in violation of the Tribe's rights.

34. Defendant admits that it does attempt to collect income tax from persons who earned income as tribal officers or employees but denies that the application of State tax laws to tribal officers or employees is unlawful or in violation of the Tribe's rights to self-government or due process of law.

35. Defendant has no knowledge of whether or not anyone who may be subject to tribal tax laws is evading those tribal laws and neither admits nor denies allegation 35 but concludes that tribal tax collection is the sole responsibility of the Tribe.

36. Defendant denies that it has taken any action that resulted in injury to the Tribe.

PRAYER FOR RELIEF

WHEREFORE, Defendant prays for judgment denying the Tribe any and all declaratory and injunctive relief requested in the complaint.

DATED this 4th day of October, 1990.

Respectfully submitted,
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GENERAL COUNSEL

David Allen Miley, OBA#11933
Assistant General Counsel
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(405) 521-3141

Certificate of Mailing Omitted

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE SAC AND FOX NATION,)
)
Plaintiff,)
)
v.) CIV-90-1553 A
)
THE OKLAHOMA TAX COMMISSION,)
)
Defendant.)

PRELIMINARY STATUS REPORT

Date of Conference: November 8, 1990.

Appearances: G. William Rice, Brent Parmer, Gregory H. Bigler, Cushing, OK, for Plaintiff; David A. Miley, Oklahoma City, OK, for Defendant

I. A. BRIEF PRELIMINARY STATEMENT

FIRST CLAIM

Plaintiff is a federally recognized Indian Tribe. Defendant is the tax collection agent for the State of Oklahoma. Plaintiff, in an attempt to raise revenue for the operation of its government, levies a tax upon motor vehicles which are principally garaged in its jurisdiction -- trust land owned by members of the Nation. Plaintiff issues Certificates of Title and License Tags (registration) to those paying the motor vehicle tax.

Defendant, through its various agents, refuses to recognize Certificates of Title and License Tags issued by the Plaintiff. Unlike an out-of-state title, which is treated as a negotiable instrument, Defendant demands that back taxes be paid by any individual desiring to have the Plaintiff's Certificates of Title

exchanged for Defendant's (Oklahoma) Certificates of Title. This action discourages residents taxed in Plaintiff's jurisdiction from trading for or purchasing vehicles owned by dealers or residents within the Defendant's jurisdiction.

Although Defendant will not recognize Plaintiff's Certificates of Title and License Tag Registrations, there are no attempts by Defendant to collect taxes on vehicles owned by residents within Plaintiff's jurisdiction until the point of trade, sale, or exchange of the motor vehicle. Plaintiff contends that Congress never authorized the State of Oklahoma to tax residents within the Indian Country subject to Plaintiff's jurisdiction, including the Sac and Fox reservation. Defendant contends that there are no reservations in Oklahoma, and it may tax any individual within the boundaries of the State of Oklahoma as long as no Indian Reservation exists.

SECOND CLAIM

Plaintiff levies taxes upon earnings of employees working within Plaintiff's jurisdiction. Defendant attempts to tax the earnings of said individuals working within Plaintiff's jurisdiction within the exterior boundaries of the State of Oklahoma. The taxation by Defendant discourages the payment of tax to Plaintiff and discourages people from becoming employed by Plaintiff.

Plaintiff contends that Congress has never authorized the State of Oklahoma or any of its agents to tax the earnings of individuals employed within the Indian Country subject to Plaintiff's jurisdiction, including the Sac and Fox reservation. Defendant contends it has a lawful right to collect taxes upon those employed by the Plaintiff or otherwise employed within Plaintiff's jurisdiction within the exterior boundaries of the State of Oklahoma.

B. SUGGESTED VOIR DIRE QUESTIONS.

Non-jury trial. No voir dire questions are necessary.

II. STIPULATIONS

A. All parties are properly before the Court;
B. The Court has jurisdiction of the parties and of the subject matter;
C. There is no question as to misjoinder or nonjoinder of the parties;
D. All parties have been correctly designated;
E. Facts:

First Claim

1. Plaintiff is a federally recognized Indian tribe located within the boundaries of the State of Oklahoma.
2. Defendant is the Oklahoma Tax Commission.
3. Plaintiff taxes the ownership of motor vehicles if those vehicles are principally garaged on trust land, tribally owned land, or restricted allotments located within the Sac and Fox Reservation or within "Indian Country" under the jurisdiction of the Sac and Fox Nation.
4. Plaintiff issues Certificates of Title and Registration Certificates to owners of motor vehicles which are taxed by the Plaintiff.
5. Persons possessing motor vehicles having registration and title certificates issued by the Plaintiff often trade or sell those motor vehicles to individuals located outside the Plaintiff's jurisdiction and within the State of Oklahoma.
6. The District Court of Lincoln County, State of Oklahoma, has previously ruled upon the question of State taxation of motor vehicles titled and registered by the Sac and Fox. See Exhibit A attached.
7. Defendant continues to require payment of money equivalent to the taxes, penalties, and interest it would have imposed upon a motor vehicle during the time it was taxable by the Sac and Fox

Nation as a prerequisite to issuance of Oklahoma title and registration documents when Tribally titled and registered motor vehicles are sold, traded, or otherwise removed from the Indian Country of Plaintiff.

Second Claim

1. Plaintiff and other employers within the Sac and Fox jurisdiction pay employees for their services.
2. Most of Plaintiff's employees are members of the Sac and Fox Nation, but some employees are non-member Indians and non-Indian.
3. Plaintiff taxes the earnings of persons employed within the Sac and Fox jurisdiction.
4. Defendant is attempting to tax the earnings of employees within the Sac and Fox jurisdiction within the exterior boundaries of the State of Oklahoma.

F. Legal Issues:

1. Has the original Sac and Fox reservation been diminished or disestablished by federal law?
2. Do the treaty stipulations between the Sac and Fox Nation and the United States, the federal common law, or the inherent authority of the Sac and Fox Nation preempt whatever authority the State might otherwise have within the Indian Country of the Sac and Fox Nation?
3. Does the Oklahoma Tax Commission have the authority to tax personalty and income within said jurisdiction?

G. Factual Issues:

No factual issues can be determined at this time.

III. CONTENTIONS

A. Plaintiff:

1. Facts:

(a) The Sac and Fox Reservation has not been disestablished by Congress.

(b) That even if no reservation exists; that the Sac and Fox Nation has the authority to levy tax upon motor vehicles garaged within "Indian Country" as defined by 18 U.S.C. 1151, and the Plaintiff may tax income within "Indian Country" also.

(c) The State of Oklahoma and its agencies are prohibited from taxing individual income earned, and personal property located within the jurisdiction of the Sac and Fox Nation by paramount federal law.

B. Defendant:

1. Facts:

(a) The Sac and Fox Reservation has been disestablished.

(b) There exists no area within which the United States or the Sac and Fox Nation may exclude the State of Oklahoma and its agencies from taxation upon individuals' earnings or personal property.

. EXHIBITS

A. Plaintiff:

Number	Title	Objection	Rule Relied Upon
1.	Map of Reservation		
2.	Tax Records of Nation		
3.	Dawes Commission Records		
4.	Memos from Oklahoma Tax Commission		
5.	Letters from Oklahoma Tax Commission		
6.	Sac and Fox Constitution		
7.	Sac and Fox Revenue Code and pertinent resolutions		
8.	Treaty of Fort Harmer		
9.	Record from the Lincoln County car tag case.		

B. Defendant:

Number	Title	Objection	Rule Relied Upon
1			

V. PRELIMINARY WITNESSES LIST

A. Plaintiff:

Name	Address	Proposed Testimony
Elmer Manatowa		That he is Chief of the Sac and Fox Nation, and receives remuneration wnich is taxed by the Defendant.
Gaylon R. Franklin, Sr.		That he is Second Chief of the Sac and Fox Nation and receives remuneration which is taxed by the Defendant. Further, he was a defendant in the Lincoln County car tag case and will testify regarding that case.
Truman Carter		That he is the Treasurer of the Sac and Fox Nation, and receives remuneration which is taxed by the Defendant. He will testify as to how revenues earned from taxes are used. Further, he was a defendant in the Lincoln County car tag case referred to above, and will testify regarding that case

Betty Wahpepah	That she is employed as the Tax Commissioner for Plaintiff and receives a salary which is taxed by the Defendant. That she collects money from taxes on motor vehicles and on earnings of individuals for the Plaintiff.
Jeanne Pound	She will testify that she is the Court Clerk for the Sac and Fox Nation. She will testify concerning the Court budget as well as the types of cases and case load of said court.
George Harjo	He will testify that he is the police chief for the Sac and Fox Nation and will give information about the police budget as well as the area for which his which his department is responsible.

B. Defendant:

Name	Address	Proposed Testimony

VI. TRIAL BRIEFS -- not completed at this time.

VII. ESTIMATED DISCOVERY AND TRIAL TIME

Four days for trial if stipulations can be made. It is estimated that three months will be needed for discovery.

VIII. POSSIBILITY OF SETTLEMENT

Good _____ Fair _____ Poor X

IX. POSSIBILITY OF COURT-ANNEXED ARBITRATION -- LO-CAL RULE 43

This case is not eligible for mandatory arbitration under 28 U.S.C. 652(a)(2) in that said statutes were not meant to apply to any federally recognized Indian tribe.

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IN THE UNITED STATES DISTRICT COURT
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THE SAC AND FOX NATION, Plaintiff,	)	
v.	)	CIV-90-1553 A
THE OKLAHOMA TAX COMMISSION, Defendant.	)	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant, the Oklahoma Tax Commission, moves the Court to grant summary judgment in its favor against Plaintiff, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

This motion is based on the ground that the pleadings and the Preliminary Status Report show that there is no substantial controversy as to any material fact and that Defendant may validly enforce its income tax and motor vehicle taxes against Sac and Fox tribal members, tribal employees and non-tribal members who live or work within the former Sac and Fox Reservation in Oklahoma. Therefore, the Oklahoma Tax Commission is entitled to judgment against the Sac and Fox Nation as a matter of law.

DATED this 6th day of February, 1991.

Respectfully submitted,
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Certificate of Mailing Omitted

IN THE UNITED STATES DISTRICT COURT
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THE SAC AND FOX NATION, Plaintiff,	)	
v.	)	CASE NO. CIV-90-1553-A
THE OKLAHOMA TAX COMMISSION, Defendant.	)	

OKLAHOMA TAX COMMISSION'S

BRIEF IN SUPPORT OF DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

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ATTORNEY FOR:

OKLAHOMA TAX COMMISSION

February, 1990

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	)	CIV-90-1553-A
	)	
THE OKLAHOMA TAX COMMISSION,	)	
	)	
Defendant.	)	

BRIEF IN SUPPORT OF DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

STATEMENT OF MATERIAL FACTS AS TO WHICH
THERE IS NO SUBSTANTIAL CONTROVERSY.

The Defendant's admissions in the pleadings, the stipulations in the Preliminary Status Report and the exhibits attached hereto show that there is no substantial controversy as to any material fact presented in this litigation:

1. The Sac and Fox Nation, "Tribe" hereafter, is a federally recognized Indian tribe located within the State of Oklahoma, which is organized pursuant to the Oklahoma Indian Welfare Act, 25 U.S.C. 501 et seq. The offices of the Tribal headquarters are located near Stroud, Oklahoma, on land held in trust by the United States Government for the benefit of the Tribe. (Petition 1, Answer 1).

2. The Oklahoma Tax Commission, "State" hereafter, is the State agency responsible for enforcing and administering State Tax laws, including State motor vehicle and income taxes. (Petition 2, Answer 2).

3. The Tribe imposes motor vehicle taxes and registration

requirements on its members who own motor vehicles. The Tribe also imposes income taxes on its members and on non-members who work for the Tribe. The State has never attempted to prevent the Tribe from imposing or enforcing these taxes, which the Tribe has the power to impose by virtue of its right to self-government. (Complaint 5, 19, 20, 32, Answer 5, 19, 20, 32, Preliminary Status Report Section II, subsection E).

4. The State imposes motor vehicle excise taxes on the transfer of ownership or use of a motor vehicle in this State pursuant to the Vehicle Excise Tax Act, 68 O.S. 2101 et. seq. The State also imposes annual registration fees on the registration of every vehicle in this State pursuant to the Oklahoma Vehicle License and Registration Act, 47 O.S. 1101 et. seq. The State also imposes an income tax on all residents and nonresidents who receive income in Oklahoma pursuant to the Oklahoma Income Tax Act, 68 O.S. 2351 et seq.

5. When an owner of a vehicle obtains a tribal title and license plate for that vehicle and does not obtain a title or license plate from the State, the State taxes applicable to that vehicle are considered to be delinquent by the State. When a subsequent owner of that vehicle applies to the State for a title and license plate, the subsequent owner must bring up the title on the vehicle by paying the current and delinquent excise taxes on the transfers of the vehicle, 47 O.S. 1133(H) and 68 O.S. 2103(A). Also, for years in which the owner used the vehicle in this State but did not pay annual State registration fees, the subsequent owner will be required to pay the current year's fee and the fees and penalties for one previous year under 47 O.S. 1115(E) in order to obtain a State license plate. [Preliminary Status Report Section II, subsection E(7)].

6. All tribal employees, whether tribal members or nonmembers, or any person who receives income for employment or work performed on tribally-owned land within Oklahoma are subject to pay Oklahoma income taxes. The State does attempt to assess and collect the income tax from such persons if they fail to report their income and pay those taxes pursuant to the Oklahoma Income Tax Act, regardless of whether or not those persons have

paid tribal income taxes. [Preliminary Status Report Section II, subsection E(4)].

STATEMENT OF ISSUES

The issues in this case are, first, has the original Sac and Fox reservation been diminished or disestablished by federal law? Second, this case involves whether the State motor vehicle and income tax laws infringe on the Tribe's right to govern itself or whether those State laws have been pre-empted by Federal laws.

ARGUMENT AND AUTHORITIES

A. THE SAC AND FOX RESERVATION NO LONGER EXISTS IN OKLAHOMA.

The issue of whether or not an Indian reservation exists in this case is drawn from the distinction made in the treatment of the companion cases of McClanahan v. Arizona Tax Commission, 411 U.S. 164, 93 S.C. 1257, 36 L.Ed.2d 129 (1973) and Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S.C. 1267, 36 L.Ed.2d 114 (1973). In Mescalero, a tribally owned business operated off of the Tribe's reservation was subject to State gross receipts taxes because Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State. In the McClanahan case, the Supreme Court found that an individual Navajo Indian who lived and earned her income entirely within the Navajo Reservation in Arizona was not subject to State income taxes because State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that state law shall apply.

This distinction stems from the Courts early decision in Worcester v. Georgia, 6 Pet. 515, 8 L.Ed. 483 (1832), wherein the concept was developed that reservations were "distinct political communities, having territorial boundaries, within which their authority is exclusive." The Court found in McClanahan that it

followed from this concept of Indian reservations as separate, although dependant nations, that state law could have no role to play within the reservation boundaries. Therefore, the Supreme Court held at 411 U.S. 181 that with regard to the application of State laws, "the question has always been whether the State action infringed on the right of reservation Indians to make their owns laws and be ruled by them," (the Court's emphasis) quoting Williams v. Lee, 358 U.S. 217, 79 S.C.269, 3L.Ed. 2d 251 (1959).

In McClanahan, the Supreme Court began its analysis with the treaty which the United States entered with the Navajo Nation in 1868 to provide a reservation for the use and occupation of the Navajo. Although the treaty nowhere states that the Navajo's would be exempt from State taxes, the Supreme Court interpreted the treaty to preclude extension of State law to the Indians because the treaty was intended by the Government to establish an exclusive federal reservation under general federal supervision. State taxes were not applicable to tribal members on the reservation in the McClanahan case because Congress intended to provide a reservation for the Tribe to develop a separate community apart from the general community of the state so that they could make their own laws and be ruled by them. Application of State laws would impermissibly infringe that right. However, the Court closely tailored the decision in McClanahan to the reservation situation and the Court recognized that the decision was not applicable to off-reservation situations. In fact, in the Williams case, supra, the Court found at note 6, 358 U.S. 221, that Congress had granted extensive jurisdiction over Oklahoma Indians to the State as outlined in the Solicitor General's treatise for the Department of Interior, Federal Indian Law (1958) at 985-1051. Congress did not intend to maintain reservations in Oklahoma but instead embarked on a policy of assimilation of the tribes in Oklahoma.

The treatment of Indian tribes in the former Indian Territory, now Oklahoma, was much different than that of the Navajo experience. The Sac and Fox Nation was removed to Indian Territory where a reservation was established for the Tribe by the Federal Government in the latter half of the Nineteenth Century. At that time the Indian Territory consisted entirely of contiguous

Indian reservations belonging to numerous tribes. However, beginning with the passage of the General Allotment Act in 1887, 24 Stat. 388, the Indian reservations were allotted in severalty to tribal members with the remaining unallotted lands to be purchased by the Government and thrown open to homesteading.

Many reservations in Indian Territory were disestablished under the General Allotment Act, but that Act was, by its terms, inapplicable to the Osage Tribe and the Five Civilized Tribes in Oklahoma. Congress enacted the Dawes Commission Act, 27 Stat. 612, in 1893 for the purpose of extinguishing the tribal titles to the land of the Five Civilized Tribes, either by cession or allotment, with a view to the ultimate creation of a state to embrace the lands within the territory. This was a comprehensive program by the Federal Government to politically reconstruct the Territory. The case of Woodward v. DeGraffenried, 238 U.S. 284, 35 S.C. 764, 59 L.Ed.1310 (1915), details the efforts of Congress to organize the Territories for Statehood and cites the annual reports of the Dawes Commission in its efforts to further the policy of Congress toward disestablishing the tribal reservations in note 1 at 238 U.S. 296, and note 2, 238 U.S. 299.

From the mid-1890's until Oklahoma Statehood in 1907, the Federal Government spent great sums of money and energy in the reconstruction of Indian Territory by disestablishing all of the reservations through allotment in order to replace the several tribal governments with a constitutional State government capable of admission into the union on an equal footing with the original states. It was against this background that Congress affirmed and ratified the cession agreement with the Sac and Fox. The Sac and Fox reservation was ceded to the United States under the Act of February 13, 1891, 26 Stat. 749. This agreement specifically states that, "the Sac and Fox Nation hereby cedes, conveys, transfers, surrenders and forever relinquishes to the United States of America, all their title, claim or interest, of every kind or character, in and to ... " the following described reservation. The reservation was opened to settlement by Presidential Proclamation at 27 Stat. 989.

Many Tribes objected to the disestablishment of their reservations, such as the case of Lone Wolf v. Hitchcock, 187 U.S. 553, 23 S.C. 217, 47 L.E. 299 (1903), where the Kiowa Tribe asserted that the treaties which created their reservation stipulated that the reservation would not be disestablished and included within a state without their consent. The Supreme Court found that Congress had the Constitutional power to abrogate the provisions of an Indian treaty unilaterally, and the exercise of that power was valid in this case. The Court stated:

> Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.

It can be seen that these Tribes were treated much differently than tribes in other States such as the Navajo Tribe in the McClanahan case. From the tenor of these legislative reports and the actions of Congress at the turn of the century, it is clear that the Federal Government was unpleased with the course of social evolution in the Indian Territory and Congress worked in earnest to effect a lasting change in the way these citizens would be governed. The Congressional intent to disestablish all reservations in Oklahoma has carried forward to the present, and Congress has since recognized that no reservations survived past Statehood; S. Rep. No. 1232, 74th Cong. 1st Sess., July 29, 1935, states:

> In Oklahoma the several Indian reservations have been divided up, the Indians having first chance at the selection of allotments or farms. After the Indians were allotted lands of their selections, the balance of the several reservations were divided up into farms and disposed of to white settlers; hence, as a result of this program, all Indian reservations as such have ceased to exist and the Indian citizen has taken his place on an allotment or farm and is assuming his rightful position among the citizenship of the State.

Against this background, the Supreme Court stated in Oklahoma Tax Commission v. United States, 319 U.S. 598 (63 S.C. 1284, 87 L.E.1612 (1943):

> The many cases dealing generally with the problem of Indian tax exemptions provide no basis for the government's argument that Congress, in view of the existing legal framework, must have assumed that it would immunize the securities and cash from estate taxes by restricting their alienation. Worcester v. Georgia, 6 Pet. 515, 8 L.Ed. 483, held that a state might not regulate the conduct of persons in Indian territory in the theory that the Indian tribes were separate political entities with all the rights of independent status - a condition which has not existed for many years in the State of Oklahoma.
>
> The underlying principles on which these decisions are based do not fit the situation of the Oklahoma Indians. Although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy as in Worcester v. Georgia, supra; and, unlike the Indians involved in The Kansas Indians case, supra, they are actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions.

The Supreme Court cited Oklahoma Tax Commission with approval in McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973), where the Court held that Arizona could not tax the income of an Indian on the Navajo reservation in that state. The Court stated at 411 U.S. 167-168:

> It may be helpful to begin our discussion of the law applicable to this complex area with a brief statement of what this case does not involve. We are not here dealing with Indians who have left or never inhabited

> reservations set aside for their exclusive use or who do not possess the usual accoutrements of tribal self-government. See e.g., Organized Village of Kake v. Egan, 369 U.S. 60 (1962); Metlakatla Indian Community v. Egan, 369 U.S. 45 (1962), Oklahoma Tax Commission v. United States, 319 U.S. 598 (1943).

And again at 411 U.S. 171 of that opinion:

> As noted above, the [Indian sovereignty] doctrine has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community. See e.g. Oklahoma Tax Commission v. United States, 319 U.S. 598 (1943).

All of these opinions expressed in Supreme Court decisions, Congressional reports, and federal publications, coupled with the surrounding circumstances which prompted Congress to adopt the policy of allotment and assimilation of the several reservations in Indian Territory all point to the conclusion that the tract of land in question here, or any tract of land in Oklahoma, is not a reservation.

The Supreme Court held in Solem v. Bartlett, 465 U.S. 463, 104 S.C. 1161, 79 L.Ed.2d 443 (1984), that explicit language of cession and unconditional compensation are not prerequisites for a finding that a reservation has been disestablished. The Court also looks to surrounding circumstances, the tenor of legislative reports presented to Congress, and events that happened after the passage of the Act as well as Congress' own treatment of the affected area in the following years to decipher Congress' intentions. Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, the Court acknowledges de facto, if not de jure, diminishment, Solem at 465 U.S. 471, citing Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) and DeCoteau v. District County Court, 420 U.S. 425 (1975). When the factors set out in these three cases are applied in the context of the case at bar, it is clear that reservations no longer exists in Oklahoma.

B. STATE TAX LAWS ARE NOT PRE-EMPTED BY FEDERAL LAW AND DO NOT INFRINGE THE TRIBE'S RIGHT TO GOVERN ITSELF.

1. STATE INCOME TAXES ARE NOT PRE-EMPTED AND DO NOT INFRINGE TRIBAL SELF-GOVERNMENT.

The Tribe argues that tribal members or nonmembers employed by the Tribe or who receive income from work performed on tribal trust land are exempt from state income taxes on that income. The principal authority for this position is McClanahan v. Arizona Tax Commission, 411 U.S. 164, 93 S.C. 1257, 36 L.Ed.2d 129 (1973). In McClanahan the Court ruled that a Navajo Indian who resided and earned all of her income within the Navajo Reservation in Arizona was not subject to state income taxation.

As the State has discussed above, no Indian reservations remain in Oklahoma, which precludes the Tribe's reliance on McClanahan since the legal existence of a reservation was the salient point of the Court's ruling. The reservation was created by Congress to allow the Navajo Tribe in that case to govern themselves. Application of State laws within the federal area would necessarily infringe tribal rights which Congress intended to protect and was therefore not permitted.

The Court recognized that Congress did not have this same intention for Tribes off of a reservation. The limitations of the McClanahan decision are more important than the ruling itself. At the outset of the case, the Court stated at 411 U.S. 167:

> It may be helpful to begin our discussion of the law applicable to this complex area with a brief statement of what this case does not involve. We are not here dealing with Indians who have left or never inhabited reservations set aside for their exclusive use or who do not possess the usual accoutrements of tribal self-government. See, e.g., Organized Village of Kake v. Egan, supra; Metlakatla Indian Community v. Egan,

> 369 U.S. 45 (1962); Oklahoma Tax Commission v. United States, 319 U.S. 598, 63 S.Ct. 1284, 87 L.Ed. 1612 (1943).

In Oklahoma Tax Commission v. United States, the Supreme Court found that the Court has repeatedly said that tax exemptions are not granted by implication. It has applied that rule to taxing acts affecting Indians as to all others. As was said of an excise tax on tobacco produced by the Cherokee Indians in 1870, "if the exemption had been intended it would doubtless have been expressed," The Cherokee Tobacco, 11 Wall. 616, 20 L.Ed. 227 (1871). If Congress intends to prevent the State of Oklahoma from levying a general nondiscriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences.

The Court went on to say, it is true that our interpretation must be in accord with the generous and protective spirit which the United States properly feels toward its Indian wards, but we cannot assume that Congress will choose to aid the Indians by permanently granting them immunity from taxes which they are as able as other citizens to pay. It runs counter to any traditional concept of the guardian and ward relationship to suppose that a ward should be exempted from taxation by the nature of his status, and the fact that the federal government is the guardian of its Indian ward is no reason, by itself, why a state should be precluded from taxing the estate of the Indian. The Court has held that the Indians, like all other citizens, must pay federal income taxes. Superintendent v. Commissioner, 295 U.S. 418, 55 S.Ct. 820, 79 L.E. 1517 (1935). Wardship with limited power over his property did not there without more, render the Indian immune from the common burden. The Supreme Court stated at 319 U.S. 608-610:

> Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes.

Congress has passed laws under which Indians have become full fledged citizens of the State of Oklahoma. Oklahoma supplies for them and their children, schools, roads, courts, police protection and all the other benefits of an ordered society. Citizens of Oklahoma must pay for these benefits. If some pay less, others must pay more. Since Oklahoma has become a state, it has been authoritatively stated that tax losses resulting from tax immunity of Indians have totaled more than $125,000,000, a sum only slightly less than the bonded indebtedness of the state. If Congress intended to relieve these Indians from the burden of a state inheritance tax as a consequence of our national policy toward Indians, there is still no reason why we should imply that it intended the burden to be borne so heavily by one state. But there is a complete absence of any evidence of congressional belief that these exemptions are required on equitable grounds, no matter on which sovereign the burden falls. Here is a tax based solely on ability to pay. "Only the same duties are exacted as from our own citizens. The burden must rest somewhere. Revenue is indispensable to meet the public necessities. Is it unreasonable that this small portion of it shall rest upon these Indians?" The Cherokee Tobacco, supra, 11 Wall. page 621, 20 L.Ed. 227.

> Recognizing that equality of privilege and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism.

A month after the Supreme Court rendered its decision in Oklahoma Tax Commission v. United States, the Tenth Circuit Court of Appeals held in United States v. Hester, 137 F.2d 145 (1943), that:

> It is pertinent to remember that the sovereign State of Oklahoma has plenary power to tax all property within its domain, unless specifically restrained by force of Federal law. Indians residing in Oklahoma are citizens of that State, and they are amenable to its civil and criminal laws. Their property, unless exempt, is subject to taxation in the same manner as property belonging to other citizens of that State.

In the case of Choteau v. Burnet, 283 U.S. 691, 51 S.C. 598, 75 L.Ed. 1353 (1931), the Supreme Court ruled that an Osage Indian holding a certificate of competency was subject to federal income taxes on his royalty income from the Osage headright. The taxpayer in Choteau resisted the tax claiming an exemption because of his status as an Indian. The Court rejected the taxpayer's assertion and found that no provision in any of the treaties referred to has any bearing upon the question of the liability of an individual Indian to pay tax upon income derived by him from his own property. The course of legislation discloses that the plan of the government has been gradually to emancipate the Indian from his former status as a ward; to prepare him for complete independence by education and the gradual release of his property to his own individual management. This plan has included imposing upon him both the responsibilities and the privileges of the owner of property including the duty to pay taxes. The Court then held at 283 U.S. 695:

> There are provisions in the Act of 1906 with respect to the holding, payment, and administration of the royalty shares of members who do not have certificates of competency, but with these we are not concerned. The shares of royalty of those holding such certificates are to be paid to them quarterly.
>
> The petitioner, then, was competent to hold and make any use (except to grant mining leases) of all his lands. All except his homestead were taxable, and were

freely alienable without control or supervision of the government. His share of the royalties from oil and gas leases was payable to him, without restriction upon his use of the funds so paid. It is evident that, as respects his property other than his homestead, his status is not different from that of any citizen in the United States. In the process of gradually changing the relation between the Indian and the government he has been, with respect to the income in question, fully emancipated. Compare United States v. Waller, supra. It is true, as petitioner asserts, that as to his homestead he still remains a restricted Indian. But this fact is only significant as evidencing the contrast between his qualified power of disposition of that property and his untrammeled ownership of the income in controversy. The latter was clearly beyond the control of the United States. The duty to pay it into petitioner's hands, and his power to use it after it was so paid, were absolute.

The Choteau case is precisely on point with the case at bar in that the taxpayer claimed that he was not subject to income tax because of his status as an Indian and the fact that he received the income from his restricted allotment held in trust by the United States, where he lived (the Court notes that the land was his homestead). The Court found that he was taxable because of his untrammeled ownership of the income when he received it. In the case at bar, the tribal employees receive their wages and their power to use that income is absolute and unrestricted. The fact that they received income from work performed on tribal trust land does not impair their power over that money and the taxation of that income is not an infringement of tribal rights. Although Choteau dealt with federal taxes, the Supreme Court applied the same reasoning to reach the same result in a similar case with regard to State taxes in Leahy v. State Treasurer of Oklahoma, 297 U.S. 420, 56 S.C. 507, 80 L.Ed. 771 (1936). If the State and Federal income taxation of the individual Indians in Leahy and Choteau did not infringe the rights of the Osage Tribe, it cannot

be proposed by the Sac and Fox that taxation of wages paid to its employees infringes its rights.

The Leahy case holds that headright income of Osage Indians with a certificate of competency is subject to State income taxes. Obviously the Supreme Court has found that the State income taxation of an Osage Indian does not infringe on the Tribe's right to govern itself. The situation of the Oklahoma Indians is different than that of reservation Indians in other states, which point is made by the Supreme Court in the McClanahan case which closely tailors the ruling in McClanahan to the facts of that case. In fact Oklahoma Tax Commission v. United States, supra, and Leahy are cited with approval in McClanahan as examples of cases where Indians are properly subject to State taxes.

Therefore, the Supreme Court has clearly held that McClanahan does not apply to the situation of the Indians in Oklahoma. The case at bar is on point with Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S.C. 1267, 36 L.E.2d 114 (1973) which relied on Oklahoma Tax Commission v. United States, and Leahy for its holding that tribal activities conducted outside the reservation present different considerations. "State authority over Indians is yet more extensive over activities not on any reservation." Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State. The Court ruled at 411 U.S. 156:

> Absent clear statutory guidance, courts ordinarily will not imply tax exemptions and will not exempt off-reservation income from tax simply because the land from which it is derived, or its other source, is itself exempt from tax.

2. STATE MOTOR VEHICLE TAXES ARE NOT PRE-EMPTED BY FEDERAL LAW AND DO NOT INFRINGE TRIBAL RIGHTS.

The question of whether or not tribal members are subject to state motor vehicle taxes again hinges upon whether those motor vehicles are operated on an Indian reservation. Since no reservations exist in Oklahoma, the tribal members are subject to those state taxes.

Based on the authority in McClanahan, supra, the Supreme Court has held in Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 96 S.C. 1634, 48 L.E.2d 96 (1976), at 425 U.S. 480-481, and Washington v. Confederated Tribes of Colville, 447 U.S. 134, 100 S.C. 2069, 65 L.E.2d 10 (1980) at 447 U.S. 163-164, that state motor vehicle taxes could not validly be applied to motor vehicles owned by tribal members who resided on the reservation. However, the Court was careful to point out in Colville that the State is free to levy a tax on the use outside the reservation of Indian-owned vehicles and had the State of Washington tailored its tax to the amount of actual off-reservation use for vehicles driven both on and off the reservation, the tax could have been upheld.

Since no reservations remain in Oklahoma, there is no need to allocate on and off the reservation driving mileage in order to tax these vehicles since all of the mileage is off-reservation and the only roads available in this state are constructed and maintained by a city or county government, or the State or Federal government. Further, the revenues generated by these taxes are appropriated to public schools, and cities and counties to build and maintain roads as well as the State's general fund which provides more facilities and benefits used and enjoyed by all citizens, including Indians in this State.

There are no tribally owned or constructed roads in this state and certainly there are no reservations. Therefore, the tribal motor vehicle tax is only a profiteering venture by the Tribe since none of the taxes are used to build or maintain public schools or roads. This is not to say that the Tribe cannot collect the tax from its members. The State readily concedes that the Tribe can levy such a tax. Although the Tribe may validly collect taxes from its members, there is no federal law which pre-empts the State taxes or authorizes the Tribe to pre-empt otherwise valid state taxes.

Since tribally owned or tribal member owned motor vehicles are operated outside of any reservation and within Oklahoma, the State taxes are validly imposed, see Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S.C. 1267, 36 L.Ed.2d 114 (1973), at 148, "State authority over Indians is yet more extensive over activities not on any reservation."

The Tribe cannot pre-empt State taxes by enacting its own tax law because, "There is no conflict between the state and tribal schemes, since each government is free to impose its' taxes without ousting the other," Colville at 447 U.S. 158. An Indian tribe is free to make its own laws to govern its own members, but when that tribe or those members are operating outside of a reservation, they are responsible to State laws also, Mescalero, supra. Ward v. Race Horse, 163 U.S. 504, 16 S.C. 1076, 41 L.E.244 (1896). In this case, the tribal members are operating vehicles within the State of Oklahoma and therefore those members are subject to the concurrent jurisdiction of the Tribe and the State. Neither the Tribe nor the State can pre-empt or exclude the other's taxing authority with regard to those tribal members. Although two taxes may be burdensome, the burden is allowable as a consequence attributable to the fact that the tribal members are subject to two governmental entities which share jurisdiction, see Cotton Petroleum Corp. v. New Mexico, 490 U.S. ____, 109 S.C. 1698, 104 L.E.2d 209 (1989) at 1714.

The State takes the position that automobiles owned by the Tribe or its members are taxable regardless of whether tribal taxes are paid. But beyond that issue, the Tribe in this lawsuit complains that when a tribal member has elected not to pay State taxes on his or her automobile, but instead pays tribal taxes, that person then has difficulty reselling the car or trading it in because the person does not have a State title to their car. In order to obtain a title, the State requires payment of back taxes.

The Tribe brings this suit and asks the Federal Court to fix it for them. The Tribe wants this Court to require the State to issue car titles to owners on demand without payment of State taxes. The Federal Court may not be used to reform State laws or to bestow an exemption from tax upon an individual by decree of

Court. The Federal Court may not operate as a substitute for State legislatures. Therefore, this Court may not compel the State to issue a motor vehicle title to any individual who has not complied with the applicable State laws which require payment of certain nondiscriminatory taxes as a precedent for obtaining the required title and license. The State legislature has not exempted Indians or Indian tribes nor their subsequent transferees from the motor vehicle tax laws. This Court cannot replace the State law with its own judgment but, rather, must conform its judgment to State law. The procedure is very simple in this case; if an individual desires to obtain a car title issued by the State, that person must do all that the law requires of him to be entitled to it. This conclusion to this litigation is compelled by the Tenth Amendment to the Constitution.

The Supreme Court stated in Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.C. 817, 82 L.E. 1188 (1938) that the Constitution of the United States recognizes and preserves the autonomy and independence of the states in their legislative and judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence.

> The authority and only authority is the State, and if that be so, the voice adopted by the State as its own, whether it be of its Legislature or of its Supreme Court, should utter the last word.

The Oklahoma Vehicle Excise Tax Act is not a discriminatory law against Indian owned vehicles because it requires all persons alike to pay those taxes for vehicles in Oklahoma. Although an exemption applies to vehicles owned and titled in other states from the tax at 68 O.S. 2105(b), the vehicles in question here are operated in Oklahoma and are not titled by other states. This does not violate equal protection because the situation of a vehicle title

in another state is not equal to the situation of a vehicle titled by a tribe. Both are different and are treated differently. There are only fifty states at last count and not a single Indian tribe is listed among their number. The Ninth Circuit Court of Appeals has held in Chemehuevi Indian Tribe v. California, 800 F.2d 1446 [9th Cir. (1986)] at 1450 that an Indian tribe's sovereignty is not that of a state and therefore California need not treat the Chemehuevi Tribe as it treats other states. Since the Legislature of the State of Oklahoma has not seen fit to exempt persons who tribally title and tag the car from state taxes and laws, it is not up to this Court to create the exemption itself.

CONCLUSION

This case seemingly involves a conflict of laws between State and tribal income tax laws and motor vehicle tax laws, but actually there is no conflict at all, rather an unwillingness to pay. The unwillingness is of course grounded on the aspect of a taxpayer who is put in a position of paying two taxes. The multiple tax burden is not unconstitutional, however. There is no improper double taxation because the taxes are being imposed by two different and distinct taxing authorities. The Tribe faces the same problem as other taxing agencies confront when they seek to impose a tax in an area already taxed by another entity having taxing power.

For the reasons stated above, the State respectfully requests that this Court grant summary judgment in favor of the State and rule that the Sac and Fox Reservation has been disestablished and that State income taxes and motor vehicle taxes are applicable to both members and non-members of the tribe.

DATED this 6th day of February, 1991.

Respectfully submitted,

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CERTIFICATE OF MAILING Omitted

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE SAC AND FOX NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIV-90-1553 A
THE OKLAHOMA TAX COMMISSION,	)	
	)	
Defendant.	)	

PLAINTIFF'S OBJECTION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Sac and Fox Nation, objects to Defendant's Motion for Summary Judgment, and moves for summary judgment in Plaintiff's favor pursuant to Rule 56 of the Federal Rules of Civil Procedure.

This motion is based on the ground that the pleadings, Preliminary Status Report, and the affidavits and exhibits attached to the Plaintiff's brief in support of this motion show that there is no substantial controversy as to any material fact and that Defendant may not enforce its income tax and motor vehicle taxes against the Sac and Fox tribal members, tribal employees and other Indians and non-tribal members who live or work within the Sac and Fox Reservation and other Sac and Fox Indian Country in Oklahoma.

G. William Rice
124 N. Cleveland
Cushing, OK 74023
(918) 225-4800

CERTIFICATE OF MAILING Omitted

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE SAC AND FOX NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIV-90-1553 A
	)	
THE OKLAHOMA TAX COMMISSION,	)	
	)	
Defendant.	)	

PLAINTIFF'S BRIEF IN SUPPORT OF
ITS MOTION FOR SUMMARY JUDGMENT AND
OPPOSING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Sac and Fox Nation, objects to Defendant's Motion for Summary Judgment, and has moved for Summary Judgment in Plaintiff's favor pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiff files this brief, with supporting affidavits and exhibits, in support of said motion and its objection to Defendant's motion for summary judgment.

PROPOSITION I

THE SAC AND FOX RESERVATION HAS NOT BEEN DISESTABLISHED.

Defendant states as an article of faith that the Sac and Fox Nation has no reservation in Oklahoma. Defendant argues that "cede" and convey" type language in allotment agreements act to destroy reservations. However, it should be noted that the language of the Sac and Fox Allotment Agreement, 26 Stat. 749 (1891), is substantially similar to earlier treaties in which the Sac and Fox ceded land to the United States, yet retained governmental rights and authority therein. Often the United States would accept

ceded land then allow the Sac and Fox a reserve out of the cessation of land to live upon, hunt, and otherwise control their affairs.

Defendant argues that the 1891 Allotment Agreement disestablishes the Sac and Fox Reservation, and Defendant's argument is based upon the language of said agreement which states that the Nation "hereby cedes, conveys, transfers, surrenders and forever relinquishes' all their title, claim, or interest in the land. Words such as "cede" and "relinquish" were used in many of the Sac and Fox treaties. However, these words provided no indication as to whether or not a Sac and Fox Reservation was disestablished, created, or moved to another location, and such language has been determined to be ambiguous by the Supreme Court of the United States. *DeCoteau v. District Court*, 420 U.S. 425 (1975).

In the *Treaty of November 3, 1804*, 7 Stat. 84, which was made at St. Louis, the Sac and Fox ceded land to the United States. The pertinent part of the 1804 treaty reads: "And said tribes...do hereby cede and relinquish forever to the United States, all the lands included within the above-described boundary." See Article 2 of the *Treaty of November 3, 1804*, 7 Stat. 84. Although the land was ceded the treaty provided in part:

> ART. 7. As long as the lands which are now ceded to the United States remain their property, the Indians belonging to the said tribes, shall enjoy the privilege of living and hunting upon them. (Emphasis added).

See Article 7, Treaty of 1804. The Sac and Fox were allowed to live upon the land they ceded and use it as they saw fit.

Other treaties likewise make it clear that the "cede" and "relinquish" language was not determinative. In the Treaty of July 15, 1830, the land was ceded, but said Treaty also provided:

> But it is understood that the lands ceded and relinquished by this Treaty, are to be assigned and allot-

> ted under the direction of the President...to the Tribes now living thereon, or to such other Tribes as the President may locate thereon for hunting, and other purposes.

See Article 1, *Treaty of July 15, 1830*, 7 Stat. 328. In the Treaty of Sept. 21, 1832, the Sac and Fox once again ceded land to the United States. However the Treaty provided in part:

> ARTICLE II. Out of the cession made in the preceding article, the United States agree to a reservation for the use of...tribes...

See Article 2, *Treaty of Sept. 21, 1832*, 7 Stat. 374. The Treaty of May 6, 1861, also contained "cede, relinquish, and convey" language. But said Treaty further provided:

> The reservation herein described shall be surveyed and set apart for the exclusive use and benefit of the Sacs and Foxes of Missouri, and the remainder of the Iowa lands shall be the tribal reserve of said Iowa Indians for their exclusive use and benefit.

Article 3, *Treaty of May 6, 1861*, 12 Stat. 1171. Thus some treaties would have the tribe cede land to the United States and the United States would then allow the same tribe and perhaps another tribe to have a reserve upon the land which was ceded.

Other treaties make it clear that a tribe, at least the Sac and Fox, retained rights and privileges in land which was ceded to the United States. The Treaty of October 21, 1837, states in part:

> ARTICLE 1st. The Missouri Sac and Fox Indians make the following cessions to the United States: ...
>
> Second. Of all the right to locate, for hunting or other purposes, on the land ceded in the first article of the treaty of July 15th, 1830, which, by the authority

> therein conferred on the President of the United States they may be permitted by him to enjoy. (Emphasis added).

Article 1, *Treaty of October 21, 1837*, 7 Stat. 543. This indicates that the Sac and Fox gave up rights to land ceded in 1830 by this treaty which was made in 1837. It is clear that a tribe could cede land and retain reservation. Thus the "cede" and "relinquish" language in the 1891 Allotment Agreement must be looked at in the same light as other treaties.

The "cede and relinquish" language meant little, if anything, to the Sac and Fox. Sometimes the Sac and Fox would live on land which was ceded and sometimes they would be moved. Thus the cession language, standing alone, is ambiguous at best. Since the Sac and Fox were not to be moved by the 1891 allotment agreement, there was no reason for the Sac and Fox to believe the reservation was destroyed.

Treaties or agreements said to affect reservation boundaries must be construed liberally in favor of the Tribe, *Choctaw Nation v. United States*, 318 U.S. 423 (1943); *Choate v. Trapp*, 224 U.S. 665 (1912); *Creek Nation v. Hodel*, 851 F.2d 1439 (D.C. 1988), and interpreted as the tribe would have understood them--a land transaction not a disestablishment of the reservation. *Choctaw Nation v. United States*, supra. Ambiguity must be decided in favor of the tribes.

The ambiguity in this Agreement must also be interpreted in favor of the Sac and Fox because of the one-sided nature of the Agreement. In *Sac and Fox Tribe v. United States*, 340 F.2d 368 (Ct.Cl. 1964), the Court found that:

> In 1889 and 1890 there was great political pressure on the Government to provide more land for white settlers. The result of this political pressure became apparent in the negotiations between the Jerome Commission and the Sac and Fox Tribes. Not only were the tribes told by the land commissioners that they must sell; they were admonished that they could

sell only to the United States, and only when the United States was ready to buy; that they could not even lease or mortgage the lands. Finally, they were told by the Commission in language of unmistakable import that $1.25 per acre was all they could get because that was all the Commission and the Congress would approve. They were even advised by one of the Commissioners that 'we have offered you more lands and made a better offer than the law provides for.' (Proceedings of the Jerome Commission, National Archives, Record Group 75, letters received 4738/1894, encl. 2.) The combined effect of all of these admonitions could only be interpreted as a flat ultimatum to the illiterate and unsophisticated representatives of the Sac and Fox that they had better take $1.25, 'or else,' in common parlance...

Even if we assume that the negative characterization of the conduct of the Government by the Indian Claims Commission, as above quoted, is correct, the fact remains that this sale was negotiated by Government coercion and compulsion exerted upon appellants to such a degree as to constitute duress.

Id. at 374. See, *The Cherokee Nation v. United States*, 9 Ind.Cl.Comm. 162, 234-35. This case then, is no *DeCoteau v. District Court* in which the tribal representative voluntarily agreed that the reservation should be terminated. Instead, it was a contract of adhesion which should be interpreted strictly against the government and in favor of the Sac and Fox. There is no doubt that Congress knew exactly how to abolish Indian reservation boundaries when it chose to do so. The reservation of the Sac and Fox has not been disestablished, and the power of a tribe to tax

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See, *Act of April 21, 1904*, Ch. 1402, Sec. 8, 33 Stat. 189: "...That the reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby abolished...."

within its reservation is without question.

Even if the Court should find that the original exterior boundaries of the Sac and Fox reservation were extinguished, it is clear that the reservation was simply diminished, not abolished. Certain tribal lands were expressly excepted from the operation of the Allotment Agreement (Article II). Further, it is clear that the Sac and Fox Tribes were never paid for the lands allotted to individuals, that the Tribe was required to buy back, out of the money payment it was to receive, any acreage needed for allotments in excess of 528 expected allotments (Article IV), that the allotted lands never became public lands of the United States (Article V). Such may be the stuff of a diminished reservation, but it certainly is not consistent with disestablishment.

PROPOSITION II

THE TERM INDIAN COUNTRY ENCOMPASSES MORE THAN RESERVATION LANDS.

Regardless of the status of the original reservation, clearly the remaining Indian trust allotments and tribally owned lands are Indian Country. 18 U.S.C. 1151. Defendant Tax Commission contends that if no reservation exists, the taxing power of said Commission penetrates into all of Indian Country. The Tax Commission attempts to distinguish "reservation" from all other types of Indian Country. No court has made a jurisdictional distinction between a trust allotment and a reservation. There simply is no magic in the term "reservation". In fact the courts of the State of Oklahoma recognize that the State has no civil jurisdiction in Indian Country. *Housing Authority of the Seminole Nation v. Harjo*, 790 P.2d 1098 (1990) (dependent Indian community).

Nor does Congress distinguish between "reservation" and other types of Indian Country. Title 18 U.S.C. 1151 mentions "reservation", "allotments", and "dependent Indian communities" in defining Indian Country. When Congress first sent the Sac and Fox into Oklahoma the area was not called "reservation", but

the area was called the "Indian country south of Kansas". *Treaty of February 18, 1867*, 15 Stat. 495, Article 6.

Plaintiff contends Indian Country was a term most often accepted as the term describing where the Indians were to live and govern affairs among themselves. Most modern day courts do not distinguish between a tribe's power to govern affairs in Indian Country as opposed to the Indian Country labeled as "reservation". See *Harjo*, supra.; *Indian Country, U.S.A. Inc. v. Oklahoma Tax Commission*, 829 F.2d 967 (10th Cir. 1987). And courts in the past never made any attempt to draw subtle distinctions among the different types of Indian Country. *United States v. Sandoval*, 231 U.S. 29 (1913); *United States v. John*, 473 U.S. 634 (1978); *United States v. McGowan*, 302 U.S. 535 (1938); *DeCoteau*, supra.

Nor did the courts quibble over labels. In *United States v. Ramsey*, 271 U.S. 467 (1926), the Court forcibly asserted the continuing guardianship by the United States of the Indians in

> Oklahoma after statehood:
> But authority in respect of crimes committed by or against Indians continued after the admission of the state as it was before, in virtue of the long-settled rule that such Indians are wards of the nation, in respect of whom there is devolved upon the federal government "the duty of protection and with [it] [sic] the power". The guardianship of the United States over the Osage Indians has not been abandoned; they are still the wards of the nation; and it rests with Congress alone to determine when that relationship shall cease. (Citations omitted).

Ramsey, at 46 S.Ct. 560.

The *Ramsey* Court went on to say:

> ...the difference between a trust allotment and a restricted allotment, so far as that difference may affect the status of the allotment as Indian country, was not regarded as important...it would be quite unreasonable to attribute to congress an intention to extend the protection of the criminal law to an Indian upon a trust allotment and withhold it from one upon a restricted allotment, and we find nothing in the nature of the subject matter or in the words of the statute which would justify us in applying the term "Indian country" to one and not to the other.

Id. 46 S.Ct. at p. 560. Indian Country meant the area where Indians were placed upon to live. The particular label placed upon the type of Indian Country is irrelevant.

In conclusion, there is absolutely no logical reason to distinguish between a tribe's taxing powers upon "reservation" as opposed to other types of Indian Country. Any alleged disestablishment of the Sac and Fox reservation is unimportant since the various types of Indian Country are treated identically. The tax cases pertaining to "reservation" areas apply to the "reservation" or other types of Indian Country in the case at bar.

The Tax Commission's contention that *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 93 S.Ct. 1257 (1953), is not applicable is without merit. Defendant Commission claims *McClanahan* does not apply because it deals with reservation. As explained, the types of Indian Country are not distinguishable. The deciding factor is whether or not the State of Oklahoma has jurisdiction over members of the Sac and Fox Nation in Indian Country.

PROPOSITION III

ANY STATE WITHOUT JURISDICTION IN INDIAN COUNTRY IS ALSO WITHOUT THE AUTHORITY TO TAX WITHIN SAID JURISDICTION.

In *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 178-179 (1973) the Court explained:

> ...a startling aspect of this case is that appellee appar-

> ently conceded that, in the absence of compliance with 25 U.S.C. 1322(a), the Arizona courts can exercise neither civil nor criminal jurisdiction over reservation Indians...But the appellee nowhere explains how, without such jurisdiction, the State's tax may either be imposed or collected...Unless the State is willing to defend the position that it may constitutionally administer its tax system altogether without judicial civil or criminal jurisdiction would seem to dispose of the case.

Indeed, conferring civil and criminal jurisdiction upon a state may still leave the state without taxing authority over Indians in Indian Country. *Bryan v. Itasca County*, 426 U.S. 373 (1976).

There has never been any case which has held that a state may tax Indians within any part of Indian Country where that state has no general civil or criminal jurisdiction unless Congress has specifically legislated to grant the states taxing power. Defendant contends that *United States v. Hester*, 137 F.2d 145 (1943), is a controlling case. In *Indian Country, U.S.A., Inc. v. Oklahoma Tax Commission*, 829 F.2d 967 (10th Cir. 1987), the court stated:

> ...the State cites broad dicta in *United States v. Hester*...in support of its proposition that Oklahoma has "complete civil and criminal jurisdiction over all citizens residing within the state...the present case does not involve, nor does the Tribe challenge, Oklahoma's jurisdiction over its Indian citizens outside of **Indian country**. Moreover, *Hester* involved the authority of the state to tax a restricted Indian allotment pursuant to a specific act of Congress passed in 1928.
>
> Oklahoma's jurisdictional theory apparently dates back to the early days of statehood. At the time, state officials and non-Indians citizens attacked federal restrictions on the alienability of Indian property by

> arguing that once the Indians received United States and Oklahoma citizenship, the federal government lost its authority to treat them or their land differently...The State's 1953 position that Public Law 280 was unnecessary for Oklahoma and the broad conclusion suggested by its reading of *Hester* have been rejected by both federal and state courts. (Emphasis added).

Id. at p. 980, footnote 6. *Hester* does not seem to be adhered to.

Another case Defendant relies on is *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943). The case is inapplicable for two reasons. First, *Oklahoma Tax Commission v. United States* involved the Five Civilized Tribes. The taxing power of the Five Civilized Tribes was abolished by the Act of April 26, 1906, 34 Stat. 141. The taxing powers of the Sac and Fox have never been abolished. Defendant admits the Sac and Fox may tax.

Second, *Oklahoma Tax Commission*, as well as other cases Defendant relies on, was decided before *Williams v. Lee*, 358 U.S. 217 (1959). In *Williams v. Lee* the Court held that state law must fail if it interferes with tribal government. Imposition of state taxation upon Sac and Fox members hinders the Nation's tax collection efforts, and violates the governmental rights of the Sac and Fox Nation secured by the *Treaty of January 9, 1789*, 7 Stat. 28, and never yet superseded.

PROPOSITION IV

THE STATE, ASSUMING IT HAS JURISDICTION IN INDIAN COUNTRY, IS STILL WITHOUT THE AUTHORITY TO TAX BECAUSE OF INTERFERENCE WITH TRIBAL SELF-GOVERNMENT.

Williams v. Lee, 358 U.S. 217 (1950), announced that state laws may not infringe upon tribal self-government. The Tax Commission contends there is not interference with tribal government because Indians can use Oklahoma roads and schools.

Oklahoma's motor vehicle tax is in no way connected to the use of roads, and anyone may use Oklahoma roads.

Oklahoma schools do not teach the Sac and Fox language or history. Defendant is unwittingly engaged in forced assimilation. Defendant interferes with the tribal government's attempt to collect tax and provide services and justifies the action because the tribe cannot build schools. Defendant labels tribal taxation as "profiteering." Until tribal governments are allowed to collect tax without interference it will force Indians to rely on outside governments for services.

Requiring the Sac and Fox Nation to provide both civil and criminal protection within its jurisdiction while draining tax monies to sources outside that jurisdiction is unconscionable. A tribe's interest compared to others in raising revenue for essential government programs is stronger when the taxpayer is the recipient of tribal services. *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980). The Tax Commission argues for the right to extract tax monies from the Sac and Fox jurisdiction while the burden of exercising civil and criminal jurisdiction is on the Tribe. This frustrates tribal self-government and therefore state taxation is not allowed. *Williams v. Lee*, supra.

PROPOSITION V

THE STATE'S COLLECTION OF MOTOR VEHICLE TAX VIOLATES THE INDIAN COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION AND OTHER FEDERAL LAW.

Only the Congress may regulate commerce among Indians. U.S. Constitution, Article I, Section 8, Clause 3. States, when authorized by Congress, are allowed to tax non-Indians within the Indian Country, but states are not allowed to tax Indians, and because of the Sac and Fox treaties are not allowed to tax anyone in this action. Sac and Fox Treaties, 1789 - passim. But the tax in the case at bar is placed directly upon the members of the Sac and Fox Nation and other Indians.

The rules for state taxation in the Indian Country are exactly the opposite of the normal taxation rules. As the Court stated in *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 105 S.Ct. 2399, 2403 (1985):

> The State fails to appreciate, however, that the standard principles of statutory construction do not have their usual force in cases involving Indian law. As we said earlier this Term, "[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." Two such canons are directly applicable in this case: first, the States may tax Indians only when Congress has manifested clearly its consent to such taxation; second, statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. (Citations omitted).

The cases prohibiting state taxation of Indians within Indian Country in the absence of unmistakable authorization from Congress are legion. *Bryan v. Itasca County*, 426 U.S. 373 (1976); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976); *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578 (1980); *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160, 100 S.Ct. 2592 (1980); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069 (1980); *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989); *Herzog Brothers Trucking, Inc. v. State Tax Commission*, 516 N.Y.S. 2d 179, 508 N.E.2d 914 (1987); *LaRoque v. State*, 583 P.2d 1059 (Mont. 1978); *Valandra v. Viedt*, 259 N.W.2d 510 (S.D. 1977); *Eastern Navajo Industries, Inc. v. Bureau of Revenue*, 89 N.M. 369, 552 P.2d 805 (N.Mex. 1976); *Fox v. Bureau of Revenue*, 87 N.M. 261, 531 P.2d 1234 (N.Mex. 1975); *Waumeka v.*

Campbell, 22 Ariz.App. 287, 526 P.2d 1085 (Az.App. 1974); *White Eagle v. Dorgan*, 209 N.W.2d 621 (N.D. 1973); *Commissioner of Taxation v. Brun*, 286 Minn. 43, 174 N.W.2d 120 (Mn. 1970); *Pourier v. Board of County Comm'rs.*, 83 S.D. 235, 157 N.W.2d 532 (S.D. 1968); *Pierce v. State Tax Comm.*, 274 N.Y.S.2d 959 (N.Y. 1966); *Red Lake Band v. State*, 311 Minn. 241, 248 N.W.2d 722 (Mn. 1976); *State v. Whitebird*, 329 N.W.2d 218 (Wis. 1982); *Battese v. Apache County*, 129 Ariz. 295, 630 P.2d 1027 (Az. 1981); *Valandra v. Viedt*, 259 N.W.2d 510 (S.D. 1977).

CONCLUSION

For the foregoing reasons, Defendant's motion for summary judgment must be denied, and Plaintiff's motion for summary judgment granted.

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Certificate of Mailing omitted.

The Order of the United States District Court for the Western District of Oklahoma which disposed of the cross-motions for summary judgment, entered on April 17, 1991, is printed in the petition for certiorari page A-9.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE SAC AND FOX NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIV-90-1553 A
	)	
THE OKLAHOMA TAX COMMISSION,	)	
	)	
Defendant.	)	

OKLAHOMA TAX COMMISSION'S
MOTION FOR REHEARING

COMES NOW, the Oklahoma Tax Commission and moves the Court for rehearing and reconsideration pursuant to Rule 59 of the Federal Rules of Civil Procedure for the following reasons:

1. The Court did not resolve the issue raised and briefed by both parties of whether the former Sac and Fox Reservation, as established by 15 Stat. 495, still exists as it is described in the Cession Agreement at 26 Stat. 749.

2. The Court's ruling that the State be enjoined from imposing State income tax on income received by tribal members from tribal employment on trust land is in conflict with controlling Supreme Court precedents.

3. The Court's injunction of the State's enforcement of State motor vehicle taxes is overly broad and not supported by Supreme Court precedent.

DATED this 29th day of April, 1991.

Respectfully submitted,
DAVID HUDSON,
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Assistant General Counsel
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CERTIFICATE OF MAILING OMITTED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE SAC AND FOX NATION,)
)
Plaintiff,)
)
v.) NO.CIV-90-1553A
)
OKLAHOMA TAX COMMISSION)
)
Defendant.)

BRIEF IN SUPPORT OF OKLAHOMA TAX COMMISSION'S MOTION FOR REHEARING

I. THE COURT'S ORDER DOES NOT RESOLVE THE ISSUE OF WHETHER THE SAC AND FOX RESERVATIONS EXIST.

The issue as raised in the Preliminary Status Report, filed herein on November 8, 1990 states, "Has the original Sac and Fox reservation been diminished or disestablished by federal law?" This issue was raised and extensively briefed in the cross motions for Summary Judgment filed by both parties to the brief. This issue is important with regard to the second issue of taxability and how Supreme Court precedents can be applied to the specific situation of this case.

It is not enough to say that the Supreme Court's decision in Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe, 111 S. Ct. 905 (1991) resolved this issue because the question posed in the instant case is whether the entire expanse of the former Sac and Fox Reservation is still Indian Country. The State can stipulate now, that any tract of land that is held in trust by the federal government for the benefit of an Indian Tribe is

Indian Country. Within this State, and, more particularly, within the area of the State at issue herein, there are hundreds of tracts of land of varying sizes, scattered randomly throughout and among areas of unquestioned State jurisdiction which are held in trust by the federal government and which constitute Indian country. But the former reservation does not exist as stated in briefs filed by the State on February 7, 1991, March 8, 1991 and April 3, 1991.

This distinction makes the application of McClanahan v. Arizona Tax Commission, 411 U.S. 164, 93 S.C. 1257, 36L. Ed.2d 129 (1973) and Washington v. Confederated Tribes of Colville, 447 U.S. 134, 100 S.C. 1069, 65 L.Ed.2d 10 (1980), much more difficult than it otherwise would have been. Therefore, in order to apply the decisions of McClanahan and Colville, the Court must decide whether the reservation exists.

II. INCOME TAXATION OF TRIBAL MEMBERS.

Without deciding whether the Sac and Fox reservation exists, the Court concluded that the Tribe's trust land is a reservation. This ruling is sustainable under the Potawatomi decision. The Court, based on this finding, holds that McClanahan is applicable and rules, "the Commission may not tax the income of Sac and Fox tribal members that is derived from tribal employment on trust land". However, that is not the ruling or the analysis given in McClanahan.

McClanahan involved a narrow question, 411 U.S. 168, involving whether Arizona could tax the income of 1. a Navajo tribal member, 2. who lived on the Navajo Reservation and 3. whose entire income was earned exclusively on the reservation. One must touch all three bases to hit the tax exemption home run. Now, to apply McClanahan to the case at bar it is necessary to determine the extent of the reservation because one of the McClanahan elements is residence on the reservation.

The only determination of reservation status in this case is that the tribal headquarters building is located on a reservation. Checking all of the factors, the residence requirement is not met. Therefore, only the tribal members who both live on Indian

Country and work on Indian Country are eligible.

To comply with the ruling in McClanahan, the Court's Order must determine who works within the Sac and Fox reservation, who lives within the reservation, and out of those people, which ones are tribal members, and the injunction would be properly granted as to that limited class.

However, the Commission questions the applicability of the McClanahan decision to Oklahoma in the first place, in light of the Supreme Court's rulings in Oklahoma Tax Commission v. United States, 319 U.S. 598, 63 S.Ct. 1284, 87 L.Ed.1612 (1943), Leahy v. State Treasurer of Oklahoma, 297 U.S. 420, 56 S.C. 507, 80 L.Ed. 771 (1936), West v. Oklahoma Tax Commission, 334 U.S. 717, 68 S.C. 1223, 92 L.Ed. 1676 (1948) and United States v. Mason, 412 U.S. 391, 93 S.C. 2202, 37 L.E.2d 22 (1973), all cited and argued in previous briefs cited above.

III. MOTOR VEHICLE TAXES.

The Court next enjoined the Commission from enforcing its motor vehicle taxes by requiring the payment of license tags and excise taxes for prior years that a vehicle was properly tagged by the Tribe. The first complaint about this injunction is that it is much too broad in that the State is enjoined from collecting any motor vehicle taxes on any vehicle that is "properly tagged by the tribe." This ruling could be used by anyone to avoid State taxes whether or not they were a tribal member and whether or not the vehicle was used or "garaged" on a reservation. All that this ruling requires is that the vehicle be "properly tagged by the Tribe." This simple expedient could be accomplished by anyone regardless of whether they have met the Colville requirements and under this Order, the State would be required to grant transfer titles on request with no questions asked. Also, this ruling depends on the extent of the Sac and Fox reservation.

The Colville case dealt again with the specific situation of whether the State could tax vehicles owned by the Tribe or its members who resided on the reservation and who used the vehicles both on and off the reservation. This Court's ruling is not

so limited in that after an individual produces a tribal title, the State must give a State title to that person whether or not the person was a tribal member living on a reservation and using the vehicle both on and off the reservation.

The Colville case held that tribal members who lived on the reservation and operated vehicles both on and off of a reservation did not owe the State tax. The Colville case did not hold that any person who buys a tribal car tag is exempt from similar State motor vehicle taxes.

The Commission also disagrees with the Court's statement in footnote 4 on page 6 of the Court's Order that neither party raised the issue of whether the Commission can require tribally tagged vehicles to be tagged by the State. That issue is what this case is about and was raised and briefed by the State in the Commission's Brief in Support of Defendant's Motion for Summary Judgment filed on February 7, 1991, at pages 20-23.

In order to apply Colville, the Court must decide the extent of the tribal reservation. The State has always argued that since the Sac and Fox reservation does not exist, all roads where vehicles are used are necessarily off-reservation and tribal members are therefore taxable. The State concedes that hundreds of "reservation acreages" are scattered randomly throughout the State among areas of State jurisdiction. The situation of large contiguous areas within Indian reservations as in the Colville case, does not present itself in the case at bar.

Although the Order at page 5 cites as dicta, language in Colville which states that Washington may tax off reservation use of tribal members, the State disagrees that it is merely dicta. It is firmly established principle that regardless of tribal immunities and special rights of Indians within Indian country, State laws are fully applicable to Indians outside of Indian country. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S.C. 1267, 36 L.Ed.2d 114 (1973); Ward v. Race Horse, 163 U.S. 504, 16 S.C. 1076, 41 L.E.244 (1896).

Therefore, the vehicles at issue in this case are fully taxable because there is no evidence or finding that the vehicles are used on a reservation. The Tax Commission enforces its tax laws in this

case by requiring any person who applies for an Oklahoma title and tag to pay all applicable taxes. In that regard, this Court may not infringe the State's rights to tax its non-Indian citizens.

CONCLUSION

For the reasons stated above, the Commission respectfully requests this Court to rehear the matter of the Commission's Motion for Summary Judgment in this case.

DATED this 29th day of April, 1991.

Respectfully submitted,

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CERTIFICATE OF MAILING Omitted

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE SAC AND FOX NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIV-90-1553 A
	)	
THE OKLAHOMA TAX COMMISSION,	)	
	)	
Defendant.	)	

MOTION TO ALTER OR AMEND JUDGMENT

COMES NOW, the Plaintiff, Sac and Fox Nation, and pursuant to Federal Rule of Civil Procedure 59(e) moves this Court to alter or amend the judgment entered in this action on or about April 17, 1991 for the following reasons:

1. The Order finds that the state can impose its income tax upon nontribal members employed by the Sac and Fox.

2. The Order infers that the state can impose its car tag and excise tax upon non-tribal members' vehicles garaged upon the Sac and Fox Reservation.

3. The Order does not follow the case law distinction between on reservation activities that are "value added" and on reservation activities that merely "market an exemption", and does not give effect to the Sac and Fox Treaties which leave no room for State action.

WHEREFORE, Defendants pray this Honorable Court to alter or amend its Order dated April 17, 1991 and grant the full relief requested by the Plaintiff and deny in total Defendant's request for summary judgment.

Certificate of Mailing omitted.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE SAC AND FOX NATION,)
)
Plaintiff,)
)
v.) CIV-90-1553A A
)
OKLAHOMA TAX COMMISSION,)
Defendant.)

BRIEF IN SUPPORT OF
MOTION TO ALTER OR AMEND JUDGMENT

The parties to this litigation both filed motions for summary judgment in this action. On April 17, 1991, this Court entered an order partially granting each party's motion and partially denying each party's motion to the extent the other party's was granted.

The Plaintiff Sac and Fox Nation urges this Court to alter that order because it is more proper in the case of income tax and car tags to apply the law stated by the United States Supreme Court, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083 (1987) and of the 10th Circuit Court of Appeals, *Indian Country, USA v. Oklahoma Tax Commission*, 829 F.2d 967 (10th Cir. 1987) than the cigarette tax cases. Those two cases together dictate that the request for summary judgment of the Sac and Fox be granted by distinguishing the Supreme Court's cigarette cases insofar as the cigarette cases grant the state the right to tax non-Indians so that those non-Indians cannot enter the Indian Country for the sole purpose of escaping state taxation, and immediately leave the Indian Country after purchasing a product in which the Indian tribe has added no value and attained no real interest.

The recent decision in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, ___ U.S. ___, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) did not expand the prior cigarette tax cases,

nor did it overrule the other tribal/state tax jurisdiction cases. The Supreme Court ruled the state tax on cigarette sales to non-members was validly imposed because the tribe was merely marketing a tax exemption. *See Washington v. Confederated Tribes of Colville*, 447 U.S. 158, 100 S.Ct. 2069 (1980). The Tenth Circuit underscored the difference between activities that market exemptions and that add value, or where the non-Indian or non-member spends extended periods of time in the Indian Country enjoying the services the Tribes provide:

> The Court in *Cabazon* rejected the argument that the Tribe was marketing an exemption from state gambling laws, and distinguished *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), as follows: "In [*Colville*, id at 155, 100 S.Ct. at 2082], we held that the State could tax cigarettes sold by tribal smokeshops to non-Indians, even though it would eliminate their competitive advantage and substantially reduce revenues used to provide tribal services, because the Tribes had no right 'to market an exemption from state taxation to persons who would normally do their business elsewhere.' We stated that '[i]t is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest.' Ibid. Here, however, the Tribes are not merely importing a product onto the reservations for immediate resale to non-Indians. They have built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide. The Tribes have strong incentive to provide comfortable, clean and attractive facilities and well-run games in order to increase attendance at the games...[T]he

> Cabazon and Morongo Bands are generating value on the reservations through activities in which they have a substantial interest." *Cabazon*, 107 S.Ct. at 1093-94.

Indian Country, USA, id at 982.

Further, Articles 7, 9, 13, 14 of the *Sac and Fox Treaty at Fort Harmar, 1789*, 7 Stat. 28, (found at tab 5 of Plaintiff's Exhibits in Support of Plaintiff's Motion for Summary Judgment along with the legislative history of said treaty), and the Treaty of August 19, 1825, 7 Stat. 272 effectively grant the Sac and Fox exclusive jurisdiction over all persons who "settle upon their lands" thus leaving no room for state taxation of the income of persons who earn that income by working within the tribal jurisdiction at jobs created within the tribal jurisdiction, or of the property of persons who are "settled upon their lands" by principally garaging the vehicles within the tribal jurisdiction.

CONCLUSION

WHEREFORE the Plaintiff respectfully requests that this Court reconsider its Order entered on April 17, 1991 denying in part the Plaintiff's motion for Summary Judgment and grant in total the Plaintiff's motion for Summary Judgment.

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Certificate of Mailing omitted.

The Order of the United States District Court for the Western District of Oklahoma which disposed of the Motion for Rehearing and Motion to Alter or Amend Judgment, entered on May 21, 1991, is printed in the petition for certiorari at page A-14.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE SAC AND FOX NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIV-90-1553 A
	)	
THE OKLAHOMA TAX COMMISSION,	)	
	)	
Defendant.	)	

NOTICE OF APPEAL

Notice is hereby given that the Oklahoma Tax Commission, Defendant above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the final judgment entered in this action on the 21st day of May, 1991.

DATED June 14, 1991.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE SAC AND FOX NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIV-90-1553 A
	)	
OKLAHOMA TAX COMMISSION,	)	
	)	
Defendant.	)	

NOTICE OF APPEAL

Notice is hereby given that the Sac and Fox Nation, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Order denying the Plaintiff's Motion to Reconsider entered in this action on May 21, 1991.

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CERTIFICATE OF MAILING Omitted

The Opinion of the United States Court of Appeals for the Tenth Circuit, entered on June 16, 1992, is printed in the petition for certiorari at page A-1.